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OFFICE OF THE
EXECUTIVE SECRETARY

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August 28, 2000

COPY

Tennessee Regulatory Authority
Mrs. Sara Kyle, Chairman
Mr. Lynn Greer, Director
Mr. Melvin Malone, Director
460 James Robertson Parkway
Nashville, TN 37243-0505

Attention: Mr. K. David Waddell, Executive Secretary

Gentlemen & Mrs. Kyle:

Re: Petition of Ben Lomand Communications, Inc. for Approval
To Issue and Sell up to an Additional \$1,000,000 in Common
Stock of Ben Lomand Communications, Inc.
Docket No. 00-00680

Responding to your request on behalf of the Tennessee Regulatory Authority,
dated August 21, 2000, to me, I am pleased to render an opinion on the three questions
set out on page 2 of said letter.

Questions

1. Do the requirements of Tennessee Code Annotated § 65-29-122 apply to the proposed issuance of stock by BLC (Ben Lomand Communications, Inc.) and purchase of this stock by BLRTC (Ben Lomand Rural Telephone Cooperative, Inc.)?
2. Has BLRTC met the requirements of Tennessee Code Annotated § 65-29-122?
3. If Tennessee Code Annotated § 65-29-122 applies to the proposed purchase of BLC stock by BLRTC, and BLRTC has not complied with this section, what, if any, action does BLRTC intend to take in order to comply with this section?

POSTED
8/29/00

Opinion

1. The requirements of Tennessee Code Annotated § 65-29-122 do not apply to the proposed issue of stock by BLC. The requirements of Tennessee Code Annotated § 65-29-122 do not apply to the proposed purchase of this stock by BLRTC.

2. The purchase of up to \$1,000,000 in stock from Ben Lomand Rural Telephone Cooperative, Inc.'s subsidiary, Ben Lomand Communications, Inc., does not come under this section of the Act (§ 65-29-122), therefore, Ben Lomand Rural Telephone Cooperative, Inc. did not do anything in attempting to meet the requirements of said § 65-29-122; however, the board of directors of Ben Lomand Rural Telephone Cooperative, Inc. did take the necessary action to authorize the purchase of up to \$1,000,000 in stock of Ben Lomand Communications, Inc.

3. The answer to question 1, in our opinion, makes this question moot, and this office cannot comment or commit as to what Ben Lomand Rural Telephone Cooperative, Inc. would do nor can Ben Lomand Communications, Inc. comment or commit as to what Ben Lomand Rural Telephone Cooperative, Inc. could do, as that would be entirely up to the board of directors and/or the members of Ben Lomand Rural Telephone Cooperative, Inc., and they have not, so far as this office has knowledge, given this question any consideration.

Analysis

The subject matter of this inquiry and the questions involved are whether the provisions of Tennessee Code Annotated § 65-29-122 must be met before a cooperative can purchase stock in another corporation. To get the intent of the Legislature in enacting the Tennessee Telephone Cooperative Act of which this section that is in question is a part, the history or the matters which were occurring prior to and at the time of its enactment need to be set out herein.

In 1935, the Rural Electrification Act was passed by the U.S. Congress which made low interest rate loans available for the development of systems to furnish central station electrical service to rural areas in the United States. These loans were made available to cooperative type organizations; and shortly after 1935, many states adopted rural electrification statutes under the incentive of a federal lending program. According to our information, some 23 states, including Tennessee, enacted rural electrification type statutes. The success of electric cooperatives was almost, figuratively speaking, overnight and almost as instantaneous were the attacks made upon rural electric cooperatives by investor-owned public utilities. The point need not be labored, but an illustration of a few of the tactics used against electric cooperatives might explain why a number of the provisions of the Telephone Cooperative Act of 1961 were included in the bill which was enacted by the Tennessee Legislature.

In West Virginia and other states which had public service commissions and electric cooperative were under their jurisdiction, investor-owned utilities attempted to halt cooperative enterprises by opposing applications for certificates of convenience and necessity resulting in long delays and unnecessary expenses. Other tactics were to give free service and other special inducements to officers and members of cooperatives. In a number of cases, evidence was submitted that public utilities, through its agents, made false representations that cooperative members were personally liable for debts of the cooperative. Information was spread that a mortgage given by the cooperative would bind the individual property of the members of a cooperative. Probably the most serious tactic used by investor-owned utilities in attempting to ruin the cooperative was their sudden dash into cooperative area to build some lines immediately after the cooperative was organized and in some instances, would, after the cooperative's line had been built, parallel their lines and attempt to persuade the customers to use their service. The most damaging practice was the attempt made by representatives of investor-owned utilities to get public utility type cooperative boards to authorize the sale and disposition of all cooperative property without the consent of the members, and in some instances, where the members were taking a vote, attempt to purchase their proxy or use other means of destroying the cooperative organization.

In 1949, an analogous program for rural telephone service was commenced by the United States Congress and given to the Rural Electrification Administration for implementations. The same overall plan used for electrification, which had been a great success, had been adopted by the federal government to aid the rural telephone program. The Tennessee Legislature did not immediately adopt similar legislation to that which had been adopted for the electric program, and since there were no special telephone cooperative acts under which to be chartered, telephone cooperatives were chartered under the nonprofit laws in existence in 1951, 1952, 1953, and 1954. The telephone cooperatives that came into existence, primarily in Middle Tennessee, with a small cooperative in West Tennessee, and a cooperative in East Tennessee, soon came to the realization that the Tennessee laws under which telephone cooperatives were operating and chartered did not meet the needs of the cooperatives and its members in their goal of area coverage and universal service at reasonable costs and that a law similar to the Rural Electric Cooperative Act was needed. The lawyers representing the various cooperatives, as this writer recalls, were McAllen Foutch of DeKalb County, James H. Cummings of Woodbury, Tennessee, Proctor Upchurch of Pikeville, Tennessee, Howard Baker of Huntsville, Tennessee, H. Howser of Lafayette, Tennessee, and James W. Dempster of McMinnville, Tennessee. A number of these attorneys also represented rural electric cooperatives and were well aware of the problems that electric cooperatives in a number of the other states were having with pirating of customers, delaying tactics before public service commissions, unscrupulous attempts at getting boards of directors of electric cooperatives to sell the cooperatives and various and sundry means of attempting to get cooperatives to sell or dispose of the property. They drafted legislation to meet those problems and to also ensure that the members were protected and would have the control of their organizations. Tennessee Code Annotated § 65-29-122 was enacted for the specific purpose of requiring

membership involvement if all or a main portion of cooperative property was to be sold or mortgaged.

As a result of the thoughts and ideas of these lawyers and other persons familiar with cooperative matters, a bill was drafted by this office which was approved by the cooperatives concerned. This was given to Representative James H. Cummings, and House Bill 597 was introduced and read by Representative James H. Cummings to the General Assembly on March 13, 1961. This office is informed that the most important topic of debate at the reading of the bill was the potential for conflicting jurisdiction between telephone cooperatives and the Public Service Commission concerning, for example, rate making powers and dispute resolution authority. We are informed that the House discussions centered on the primary concern and objective, which was to provide technological services to rural communities of Tennessee comparable to the level of service enjoyed by constituents in more urban areas. The bill passed the House by a vote of 61 to 1. A companion bill in the Senate, No. 833, was introduced and read by Senator Gilbert F. Parker. We are informed that this bill evoked even less discussion on the Senate floor than its House counterpart and was unanimously passed 26 to 0 on March 16, 1961. The Telephone Cooperative Act was enacted by Chapter 330 Public Acts of 1961 and was signed into law by Governor Buford Ellington on March 17, 1961.

A careful review of the 1961 Act, Chapter 330, reveals that the Legislature addressed each of the tactics mentioned. The Act has withstood the test of time.

Ben Lomand Communications, Inc. was chartered for the purpose of engaging in or furthering the cause of areawide rural telephone service as defined in Tennessee Code Annotated § 65-29-103(4) and for the purpose of acquiring communication facilities or assuring more adequate telephone service to the members of Ben Lomand Rural Telephone Cooperative, Inc.

With a careful reading of Tennessee Code Annotated § 65-29-122 and with the history of the problems that electric cooperatives had in other states and the various methods that had been used and were being used by public utilities to eliminate electric cooperatives and in a few states had been used on telephone cooperatives, it is clear that this section (65-29-122) was to ensure that the will of the members of the cooperative, and not the will of the directors, controlled in the disposing of a major portion of cooperative property, not how money was to be invested. This section deals with only the disposing and encumbering of property.

The prohibition is against selling, mortgaging, leasing, or otherwise disposing of or encumbering all or any major portion of the property unless to specific lenders.

Tennessee Code Annotated § 65-29-122 has absolutely nothing to do with the purchase of property, the purchase of equipment, the purchase of stock, the purchase of bonds, the purchase of exchanges, or the creation of subsidiaries. A simple analysis of the wording of the statute clearly shows that it does not. The purchase of stock is not a

sale, it is not selling anything, it is not a mortgage, it is not a lease, it is not a disposal of, and it is not an encumbrance of all or a major portion of the cooperative's property, and since it is none of these listed things, it is our opinion that it is quite clear that the conditions contained therein do not have to be met in order to purchase stock.

In interpreting any act, the interpreter, whether it be a court, an agency, a commission, a lawyer, or an individual, should use the plain meaning of the words used by the Legislature. Webster's II New Riverside University Dictionary defines the words "dispose of" as follows: "1. To attend to: SETTLE. 2. To transfer or part with, as by giving or selling. 3. To get rid of."

The purchase of stock is the managing of assets or making an investment. It is not the disposition of property. Other sections of the Act cover making of investments including the purchase of stocks, bonds, etc., and especially Section 65-29-104 entitled "Powers", a copy of which is attached to this opinion. Section 65-29-104. Powers. (6) states as follows: "Become a member in one (1) or more other cooperatives or corporations or own stock therein." The powers of a telephone corporation are very broad as heretofore set out by reference. Section 65-29-111(a) provides, "The business and affairs of a cooperative shall be managed by a board of directors of not less than five (5) directors, each of whom shall be a member of the cooperative or of another cooperative which is a member. . . ." The same Section 65-29-111(f) specifies as follows: "The board of directors may exercise all of the powers of a cooperative except such as are conferred upon the members by this chapter, or its articles of incorporation or bylaws." Article IV, Section 1 of the bylaws of Ben Lomand Rural Telephone Cooperative, Inc. provides as follows:

GENERAL POWERS. The business and affairs of the Co-op shall be managed by a board of nine directors which shall exercise all of the powers of the Co-op except such as are by law, the charter and/or articles of incorporation or these by-laws conferred upon or reserved to the members.

The powers, authority, duties, and responsibilities of the board of directors are very broad.

If you desire any further opinion or more detailed opinion, please let me know.

Very truly yours,


James W. Dempster

JWD:bw

Attachment

available. Corporations organized under this chapter and corporations which become subject to this chapter in the manner hereinafter provided are hereinafter referred to as "cooperatives," and shall be deemed to be not-for-profit corporations. [Acts 1961, ch. 330, § 2; T.C.A., § 65-2902.]

65-29-103. Definitions. — As used in this chapter, unless the context otherwise requires:

- (1) "De novo" means anew, afresh and from the beginning;
- (2) "Member" means each incorporator of a cooperative and each person admitted to and retaining membership therein, and includes a husband and wife admitted to joint membership;
- (3) "Person" includes any natural person, firm, association, corporation, business trust, partnership, federal agency, state or political subdivision or agency thereof, or any body politic; and
- (4) "Telephone service" means any communication service whereby communication through the use of electricity is the principal intended use thereof, and includes all telephone lines, facilities or systems used in the rendition of such service. [Acts 1961, ch. 330, § 3; T.C.A., § 65-2903.]

65-29-104. Powers. — A cooperative has the power to:

- (1) Sue and to be sued, in its corporate name;
- (2) Have perpetual existence;
- (3) Adopt a corporate seal and alter the same at pleasure;
- (4) Furnish, improve and extend telephone service, provide extended area service and telephone toll service to its members, to governmental agencies and political subdivisions, and to other persons not in excess of ten percent (10%) of the number of its members; provided, that without regard to the ten percent (10%) limitation, telephone service may be made available by a cooperative through interconnection of facilities to any number of subscribers of other telephone systems, and through pay stations to any number of users; and provided further, that a cooperative which, prior to its becoming subject to this chapter, has acquired all or part of a telephone system or systems may continue service to persons served from such systems or facilities without requiring such persons to become members, but only if the number of persons so served does not exceed twenty-five percent (25%) of the total number of persons served by the cooperative and the twenty-five percent (25%) exception shall be reduced to ten percent (10%) within twelve (12) months from date of acquisition; and provided further, that such nonmembers shall have the right to become members upon such terms as may be prescribed in the bylaws;
- (5) Connect and interconnect its telephone lines, facilities or system with other telephone lines or systems, and make its facilities available to persons furnishing telephone service within or without this state;
- (6) Become a member in one (1) or more other cooperatives or corporations or own stock therein;
- (7) Construct, maintain, operate, purchase, take, receive, lease as lessee or otherwise acquire, and own, hold, use, equip, maintain, and operate, and sell, assign, transfer, convey, exchange, lease as lessor, mortgage, pledge, or otherwise dispose of or encumber, telephone communication lines or systems, lands,

buildings, structures, exchanges, plants and equipment, and any and all kinds and classes of real or personal property whatsoever, which shall be deemed necessary, convenient, or appropriate to accomplish the purpose for which the cooperative is organized;

(8) Purchase or otherwise acquire, and own, hold, use, and exercise and sell, assign, transfer, convey, mortgage, pledge, hypothecate, or otherwise dispose of or encumber, franchises, rights, privileges, licenses, rights-of-way, or easements;

(9) Borrow money and otherwise contract indebtedness, and issue or guarantee notes, bonds, and other evidences of indebtedness therefor, and secure the payment thereof by mortgage, pledge, deed of trust, or any other encumbrance upon any or all of its then-owned or after-acquired real or personal property, assets, franchises, revenues or income;

(10) Make any and all contracts necessary or convenient for the full exercise of the powers in this chapter granted, including, but not limited to, contracts with any person for the purchase or sale of telephone service and in connection with any such contract to stipulate and agree to such covenants, terms, and conditions as the board of directors may deem appropriate, including covenants, terms and conditions with respect to resale rates, financial and accounting methods, services, operation and maintenance practices, and, consistent with § 65-29-122, the manner of disposing of the revenues of the properties operated and maintained by the cooperative;

(11) Construct, maintain, and operate telephone and communication lines, along, upon, under and across all public thoroughfares, including, without limitation, all roads, highways, streets, alleys, bridges, and causeways, and upon, under, and across all publicly owned lands; provided, that the respective authorities having jurisdiction thereof shall have the authority to designate or specify where poles shall be located;

(12) Condemn, subject to the provisions of § 65-29-125, either the fee or such right, title, interest, or easement in property as the board of directors may deem necessary for its corporate purpose, and such property or interest in such property may be so acquired whether or not the same is owned or held for public use by corporations, associations, or persons having the power of eminent domain, or otherwise held or used for public purposes, and such power of condemnation may be exercised in the mode of procedure prescribed by §§ 29-16-101 — 29-16-122 or in the mode or method of procedure prescribed by any other applicable statutory provisions now in force or hereafter enacted for the exercise of the power of eminent domain;

(13) Conduct its business and exercise any or all of its powers within or without this state;

(14) Adopt, amend, and repeal bylaws; and

(15) Do and perform any and all other acts and things and have and exercise any and all other powers which may be necessary, convenient, or appropriate to accomplish the purpose for which the cooperative is organized. [Acts 1961, ch. 330, § 4; T.C.A., § 65-2904.]

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